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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 322

WESTERN LIVE STOCK, A PARTNERSHIP COMPOSED OF FRAZIER BIGGS AND D. F. BIGGS,

Appellant,

vs.

BUREAU OF REVENUE AND JOHN D. BINGAMAN, COMMISSIONER OF REVENUE,

Appellees.

BRIEF FOR APPELLANT

The opinions of the Supreme Court of New Mexico in the two appeals of this case are found reported in 41 N. M. 141, 65 P. (2) 863 and 67 P. (2) 505 (official citation unavailable).

Appellants have made the statement of jurisdiction required by Paragraph 1 of Rule 12.

STATEMENT OF CASE

Appellants publish a monthly livestock magazine at Albuquerque, New Mexico, known as "Western Live Stock." It has a general circulation in New Mexico and other states. (R. 1). One of its chief sources of revenue is advertising. Appellants solicit and publish, under contracts, advertise-

ments of products manufactured elsewhere than in New Mexico, such products to be sold, shipped and transported from the manufacturer to the customer. (R. 1, 2). These out-of-state or foreign advertisements are obtained by appellants both through personal solicitation by its own representatives, or through advertising agencies located in states other than New Mexico. Some advertising contracts are between appellants and the manufacturers themselves, others only with the advertising agencies. (R. 2).

In the preparation of the advertisements for insertion in appellants' magazine, all advertising material, copy, cuts, mats, etc., are sent to appellants by said foreign advertisers. (R. 2, 8). As part of the advertising contract, appellants must print the advertisements and distribute the magazines to their subscribers throughout the various states of the Union, before becoming entitled to payment from the foreign advertisers (R. 8).

Chapter 7 of the New Mexico Special Session Laws of 1934 (appearing at pages 11 to 33, inclusive, of the official report thereof) levies what is designated an "excise" or "privilege" tax, for the purpose of raising an "Emergency School Fund," and by Section 201, Subsection I, provides for the application of said tax to certain businesses as follows:

> "I. At an amount equal to 2% of the gross receipts of any person engaging or continuing in any of the following businesses: * * * publication of newspapers and magazines (but the gross receipts of the business of publishing newspapers or magazines shall include only the amounts received for the sale of advertising space) * * *." (R. 4).

Section 202 provides the tax shall not apply to transactions in interstate commerce. Other sections make it illegal to continue in business without payment of the tax, empower the taxing authorities to obtain distress warrants, restrain and enjoin further operations by a business delinquent in payment of the tax, etc.

Appellants filed suit to collect $80.27 paid under protest, representing two per cent (with penalties and interest) of the gross receipts derived from out-of-state advertising over a certain period, on the ground that said advertising and advertising contracts constituted interstate commerce, that said tax amounted to a direct and substantial burden thereon, and that accordingly said tax was repugnant to Article I, Section 8, of the Constitution of the United States. (R. 2, 4.)

Appellees demurred (R. 6, 7) and the District Court of Santa Fe County, New Mexico, overruled the demurrer and entered final judgment for appellants. (R. 9, 10.) On appeal, the Supreme Court of New Mexico reversed the lower court. (R. 19, 20.) On entry of the mandate of reversal in the lower court, appellants refused to plead further and stood on their amended complaint (R. 21) and final judgment was entered, dismissing appellants' cause with prejudice. (R. 22, 23.) Appellants appealed the cause, and the Supreme Court of New Mexico rendered its second opinion in the matter, affirming the lower court in dismissing appellants' action with prejudice. (R. 24.) On this record, this Court, on October 11, 1937, entered the following order:

> "Further consideration of the question of the jurisdiction of this Court in this case is postponed to the hearing of the case on the merits."

THE JURISDICTIONAL QUESTION

Appellants submit that the instant case falls directly and clearly within Section 237 of the Judicial Code, as involving a final judgment in a suit in the highest court of New Mexico, where is drawn in question the validity of a statute of New Mexico, on the ground of its being repugnant to the Constitution, and the decision is in favor of its validity.

Appellants seasonably, to-wit, in their first pleading in the record (R. 1) challenge the validity of the New Mexico Emergency School Tax Act (Chap. 7 N. M. Sp. Session

Laws of 1934) on the ground that it is repugnant to Article I, Section 8 of the Constitution of the United States, commonly known as the "commerce clause." (R. 2, 4). The highest court in New Mexico in which a decision could be had, to-wit, the Supreme Court of New Mexico (Constitution of New Mexico, Article VI, Sections 1 and 2) upheld the law, directly finding the same not to be unconstitutional as violating the "commerce clause" of the Federal Constitution. (R. 19, 23). The Court did not limit itself to deciding the application of the statute, although this itself would be sufficient. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239; *Eureka Pipe Line Company v. Hallanan*, 257 U. S. 265, 42 S. Ct. 101, 66 L. Ed. 227; *United Fuel Gas Co. v. Hallanan*, 257 U. S. 277, 42 S. Ct. 105, 66 L. Ed. 234. The case discloses a final judgment (R. 22, 23) and the State court sustained the statute (R. 19, 22, 23). We submit that the federal question presented is substantial and not frivolous. *Indiana Farmers' Guide Publishing Co. v. Prairie Farmers Publishing Co.*, 293 U. S. 268, 55 S. Ct. 182, 79 L. Ed. 356; *Fisher's Blend Station, Inc. v. Tax Commission of the State of Washington, et al.*, 297 U. S. 650, 80 L. Ed. 956, 56 S. Ct. 608.

Even if the cause were before the Court on a writ of certiorari, we submit that jurisdiction should be entertained because of the substantial federal question involved and the public interest in the decision. Twenty-two States of the Union have "sales" tax laws. Two States, New Mexico and Arizona, now tax newspaper advertising. (New Mexico Laws of 1935, Chap. 73; Laws of 1937, Chap. 192; Arizona Laws of 1935, Chap. 77.) Missouri did until 1934. Laws of Missouri, Extra Session, 1933-1934, Pp. 155-166. Five States tax newspaper subscriptions. (See bulletin 6649 and supplements issued by American Newspaper Publishers Association, 370 Lexington Ave., New York City.) With need for local revenue advancing rather than declining, it is likely that other States will attempt to tax advertising, and a decision on the question is one of national importance. *State v. Welsh*, 61 S. D. 593, 251 N. W. 189 at

197. No decision, state or federal, exactly in point, has been rendered.

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED

Appellants rely upon the assignments of error set forth in their petition for appeal (R. 25) which may be summarized as follows, to-wit:

1. The Supreme Court of New Mexico erred in failing to hold that advertising appearing in newspapers and magazines having interstate circulation amounted to interstate commerce.

2. The Supreme Court of New Mexico erred in failing to hold that advertising and advertising contracts between appellants and the out-of-state advertisers, specifically stipulating for and necessarily involving the interstate transmission of advertising copy and materials, the printing of the magazines, their distribution and circulation to appellants' subscribers throughout various States of the Union, all being required before appellants became entitled to the consideration for said contracts, amounted to interstate commerce.

3. The Supreme Court of New Mexico erred in failing to hold that the advertisement of goods destined to move in interstate commerce, in newspapers themselves circulated beyond the boundaries of a State, constituted interstate commerce, and that the contracts for said advertising, which both stimulate and result in the interstate sale and shipment of said advertised goods in original packages, thereby become as definitely a part of interstate commerce as the transaction in the goods themselves.

4. The Supreme Court of New Mexico erred in failing to hold that the Emergency School Tax Act, Chapter 7 of the Special Session Laws of 1934, imposing a tax of 2% on the gross proceeds of appellants' adver-

tising from out-of-state advertisers, placed a direct, immediate and substantial burden on interstate commerce, and was thereby void as being repugnant to Article I, Section 8, of the Constitution of the United States.

SUMMARY OF ARGUMENT

1. Appellant's first point consists of an analysis of the Act in question and of the exact issue to be determined, to-wit: Does national advertising constitute a transaction in interstate commerce?

2. Newspapers and magazines circulating in various States of the Union are engaged in interstate commerce, and advertising therein necessarily becomes a part of interstate commerce.

Koneky v. Jewish Press, 288 Fed. 179.

Indiana Farmers Guide Publishing Co. v. Prairie Farmers Publishing Co., 293 U. S. 268, 55 Sup. Ct. Rep. 182, 79 L. Ed. 356.

Blumenstock Bros. Advertising Agency v. Curtis Publishing Co., 252 U. S. 436, 64 L. Ed. 649, 40 Sup. Ct. Rep. 385.

Post Printing & Publishing Co. v. Brewster, 246 Fed. 321.

State v. Salt Lake Tribune Publishing Co., 68 Utah 187, 249 Pac. 474, 48 A.L.R. 553.

Little v. Smith, 124 Kan. 237, 257 Pac. 959, 57 A.L.R. 100.

3. Advertising contracts providing for the interstate transmission of the advertising materials, and thereafter for the interstate transmission of the printed newspapers and magazines containing the advertising itself, are defi-

nitely instrumentalities of interstate commerce, and immune from direct interference by a State.

Indiana Farmers' Guide Publishing Co. v. Prairie Farmers Publishing Co., 293 U. S. 268, 55 Sup. Ct. Rep. 182, 79 L. Ed. 356.

International Text Book Co. v. Pigg, 217 U. S. 91, 30 Sup. Ct. Rep. 481, 54 L. Ed. 678.

Butler Bros. Shoe Co. v. U. S. Rubber Co., 156 Fed. 1.

National Labor Relations Bd. v. Jones & Laughlin S. Corp., 301 U. S. 1, 57 Sup. Ct. Rep. 615, 81 L. Ed. 563.

4. The sale of products in the original package to purchasers residing in States other than where said products are originally manufactured or stored constitutes interstate commerce. Advertising by out-of-state advertisers, even in local newspapers and magazines, directly promotes, aids and results in the sale of such products, which are thereby transmitted in interstate commerce. Such advertising is an integral step in the interstate movement of the goods and definitely becomes an instrumentality and part of interstate commerce, and such advertising is immune from direct interference by a State. More so is this true where the advertising mediums have interstate circulation:

Post Printing & Publishing Co. v. Brewster, 246 Fed. 321.

State v. Salt Lake Tribune Publishing Co., 68 Utah 187, 249 Pac. 474, 48 A.L.R. 553.

Little v. Smith, 124 Kan. 237, 257 Pac. 959, 57 A.L.R. 100.

Butler Bros. Shoe Co. v. U. S. Rubber Co., 156 Fed. 1.

5. Chapter 7 of the Special Session Laws of 1934, imposing a 2% tax on the gross proceeds of out-of-state and national advertising, (and making no provision for segregating local from foreign business), places a direct and sub-

stantial burden thereon, and is illegal as violating Article I, Section 8 of the Federal Constitution:

United States Glue Co. v. Town of Oak Creek, 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135.

Fisher's Blend Station, Inc. v. Tax Commission of the State of Washington, et al., 297 U. S. 650, 56 S. Ct. 608, 80 L. Ed. 956.

Sprout v. South Bend, 277 U. S. 163, 48 S. Ct. 502, 72 L. Ed. 833.

Bowman v. Continental Oil Co., 256 U. S. 642, 41 S. Ct. 606, 65 L. Ed. 1139.

6. Every case advanced and relied on by appellees can be definitely and clearly distinguished from the case under consideration. The instant case falls exactly within the application of *Fisher's Blend Station, Inc. v. Tax Commission of the State of Washington*, 297 U. S. 650, 80 L. Ed. 956, 56 S. Ct. 608, decided March 30, 1936.

I.

ANALYSIS OF THE ACT IN QUESTION AND THE EXACT ISSUE TO BE DETERMINED

The New Mexico School Emergency Act of 1934 imposes a privilege tax measured by the amount or volume of business done against persons engaging in business within the State of New Mexico for the purpose of raising an "Emergency School Fund." Section 201, Subsection I, provides for the application of the tax to certain businesses, as follows:

> "I. At an amount equal to 2% of the gross receipts of any person engaging in or continuing in, any of the following businesses: * * * publication of newspapers and magazines (but the gross receipts of the business of publishing newspapers or magazines shall include

only the amounts received for the sale of advertising space) * * *"

The Constitution of the United States, in Article 1, Section 8, provides that Congress shall have power to regulate commerce among the several states. From this basic grant of power, the general principle has developed that in matters of interstate concern, the Federal Government has exclusive control and that the individual States cannot directly burden interstate commerce in any form, even by a tax on the privilege of carrying on interstate business. The Legislature of New Mexico recognized this constitutional limitation. Section 202 of the Act provides:

> "None of the taxes levied by this Act shall be construed to apply to transactions in interstate or foreign commerce, or commerce with the Indian tribes, which, under the Constitution of the United States, the State of New Mexico is prohibited from taxing."

It would appear, accordingly, that the problem of whether the tax in question amounts to a burden, direct or otherwise, on interstate commerce, need not be determined, since the very language of the Act exempts "transactions in interstate commerce." We can safely say that there is only one issue: Does "national advertising" constitute a transaction in interstate commerce? As a matter of precaution, however, appellants answer the possible implication raised by appellees' demurrer (R. 7) that the question of whether the tax is direct or indirect constitutes an issue in this cause, showing the tax to be very direct and substantial. See Point V hereinbelow.

By the term "national advertising" or "foreign advertising" appellants refer to advertising by advertisers residing and located in states other than New Mexico, who advertise in appellants' magazine products, manufactured or stored elsewhere than in New Mexico, to be sold, shipped and transferred direct from the said advertisers to the customer in the original packages as when manufactured. (R.

2). The by-word of "national advertising" is the stimulation of a demand in every State for the goods so transported between the States. An advertising program national in its scope contemplates the making of contracts with publishers in practically every state. It is the purpose of the advertiser to reach readers of any certain paper or magazine in all States in which it may circulate, as well as the State in which it is published. A "national advertising" campaign is in this day and age a necessary concomitant of the sale and shipment of goods in interstate commerce.

One other consideration is pertinent. There is no question presented of the police power of a State to prohibit, absolutely or partially (viz, by means of a tax), the publication or circulation of newspapers or magazines containing advertisements of goods, the importation or use of which is prohibited under State law. The Act taxes revenues from the advertising of all goods, which must necessarily include goods of lawful character. The Act is a revenue act pure and simple, and is not a police measure relating to public health, welfare or morals. See 48 A.L.R. 563.

We face the issue: Is national advertising interstate commerce? We answer this in the three succeeding paragraphs, considering the question from three different viewpoints, any one of which should be sufficient, and when considered together, in our opinion conclusively answers the issue in the affirmative.

II.

NATIONAL AND FOREIGN ADVERTISING APPEARING IN INTERSTATE NEWSPAPERS AND MAGAZINES CONSTITUTES INTERSTATE COMMERCE, PARTICULARLY WHERE THE ADVERTISING PROCESSES INVOLVE INTERSTATE TRANSACTIONS.

Koneky v. Jewish Press, 288 Fed. 179, 181, states:

"It may be conceded that the circulation of news-

papers throughout the country is interstate commerce."

What is the status of advertising in a newspaper or magazine having interstate circulation? This question was considered in the cases of *Post Printing & Publishing Co. v. Brewster* (1917), 246 Fed. 321; *State v. Salt Lake Tribune Publishing Co.* (1926), 68 Utah 187, 249 Pac. 474, 48 A.L.R. 553, and *Little v. Smith* (1927) 124 Kan. 237, 257 Pac. 959. 57 A.L.R. 100. All cases involved the constitutionality of State statutes prohibiting the advertising of cigarettes. The newspapers in question had circulation extending into various States of the Union, and contended that the statutes burdened interstate commerce. In all cases the Court ruled in favor of the newspapers, thoroughly emphasizing that the advertising of interstate business makes that advertising of itself interstate commerce. *Post Printing & Publishing Co.,* supra, in discussing advertising, makes this pronouncement (246 Fed. l.c. 326):

> "The sale of cigarettes in the State of Missouri, where the newspapers of plaintiff are published, is lawful business, and the transmission by plaintiff of the intelligence where and on what terms cigarettes may be purchased by its subscribers, by way of advertisements inserted in such newspaper, is perfectly legitimate and proper. * * * the business of advertising such interstate commerce business, which advertising itself not only is a form of interstate commerce, but further adheres in the very conduct of the interstate cigarette business itself, is also beyond the power of the State to prohibit or make criminal and punish, * * *"

State v. Salt Lake Tribune Publishing Co., reasons as follows (249 Pac. at 476):

> "If it is lawful, therefore, to deal in and to sell cigarettes, why is it not lawful to inform those who may legally purchase an article where they may do so?

> "The conclusion therefore seems irresistible that, in view that the advertisement published by the Salt Lake Tribune in and of itself constitutes interstate commerce with which the State of Utah could not interfere, and further, that the article likewise was protected both by the laws of Utah permitting its sale and to the extent that the article was shipped into the State in original packages was also protected from interference by the State, the defendant was clearly within its legal rights in publishing the advertisement, and that the statute in question constitutes an undue interference with interstate commerce and therefore cannot be upheld."

Little v. Smith, supra, expresses its position in this language (257 Pac. at 961-962):

> "Advertisements of goods in interstate commerce is an aid to the sale and must be regarded as an essential part of the business. * * *
>
> "Newspapers and other media of conveying information regarding proper subjects of interstate commerce must be deemed to be engaged in such commerce. Cigarettes transported from other States, sold in original packages, is commerce, and contracts for advertising and the newspapers themselves carrying such information and advertisements, in order to promote sales, are within the protection of the commerce clause of the Constitution."

Two cases of the United States Supreme Court demand our attention, to-wit: *Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.*, 252 U. S. 436, 40 S. Ct. 385, 64 L. Ed. 649; and *Indiana Farmers' Guide Publishing Co. v. Prairie Farmers Publishing Co.*, 293 U. S. 268, 55 S. Ct. 182, 79 L. Ed. 356.

The former case, decided in 1920, is an action under the Sherman Anti-Trust Act brought by an advertising agency

against the Curtis Publishing Company because of the latter's refusal to enter into a contract for the insertion of advertising matter in certain of its periodicals. The Curtis Publishing Company defended on the ground that its dealings were not transactions of interstate commerce and the United States Supreme Court so held, stating (252 U. S. at 442):

> "It may be conceded that the circulation and distribution of such publications throughout the country would amount to interstate commerce, but the circulation of these periodicals did not depend upon or have any direct relation to the advertising contracts which the plaintiff offered and the defendant refused to receive except upon the terms stated in the declaration. The advertising contracts did not involve any movement of goods or merchandise in interstate commerce, or any transmission of intelligence in such commerce."

In the *Indiana Farmers' Guide* case, decided in 1934, seven newspaper companies combined for the purpose of controlling advertising in certain mid-western States by means of offering a combination rate with which plaintiff, another newspaper, could not afford to compete. Plaintiff filed suit under the Sherman Anti-Trust Act and again the question was presented as to whether or not this combination to control advertising amounted to interstate commerce. The Court held that it did, stating (293 U. S. at 276):

> "The business that is here alleged to have been damaged is the publication and circulation of these farm papers. That business includes the obtaining of advertising, the transportation between States of electrotypes sent respectively to petitioner and respondents by their customers to be used in setting up advertisements and the transportation of substantial quantities of the papers in interstate commerce. *Advertising at compensatory rates is an essential element.* The opinion in Blumenstock Bros. Adv. Agency v. Curtis Pub. Co., 252 U. S. 436, 64 L. Ed. 649, 40 S. Ct. 385, supra,

assumed that a publishing business such as that now under consideration would amount to interstate commerce. There is no ground for the contention that the evidence in this case is not sufficient to go to the jury on the question of interstate commerce." (Italics supplied.)

Appellees rely on the *Blumenstock* case to support the validity of the New Mexico statute here assailed. We submit that the above quotations from the *Blumenstock* case and *Farmers' Guide* case themselves point out the distinction. The *Blumenstock* case involves a single item—the refusal to make a contract, having no direct relation to interstate commerce. The defendant refused to take the first step toward the ultimate movement of the goods advertised in interstate commerce. The act of which the plaintiffs complained lay at the very threshold of the business transactions which should give to the dealings between the parties an interstate character. On the other hand, the tax sought to be imposed by the New Mexico law is only upon the revenue to be derived from the completed act of advertising, at the behest of non-resident advertisers, of goods destined to move in interstate commerce, in papers themselves circulated in interstate commerce. It is similar to the situation in the *Farmers' Guide* case. We are not confined to the narrow feature of a single isolated contract—or lack of contract—but consider the broad service of advertising, with all its concomitants, relationships, and consequences. In the *Farmers' Guide* case, the Court, of necessity, had to answer this question: "Is advertising by national advertisers interstate commerce?" The Court answered in the affirmative.

It would appear, therefore, that the courts have authoritatively held that national advertising appearing in an interstate newspaper or magazine is itself interstate commerce.

III.

ADVERTISING CONTRACTS PROVIDING FOR INTERSTATE TRANSMISSION OF ADVERTISING MATERIALS AND THEREAFTER FOR INTERSTATE CIRCULATION OF FINISHED PRODUCT ARE UNDOUBTEDLY INTERSTATE COMMERCE.

In the instant case, appellants specifically allege that their advertising contracts provide for and necessarily involve the interstate transmission of the advertising materials and thereafter for transportation of the magazines in interstate commerce, all prior to completion of the contracts and payment of the revenue for said advertising. (R. 8). This is exactly the situation presented in *Indiana Farmers' Guide Publishing Co. v. Prairie Farmers Publishing Co.*, supra. Further elaboration is unnecessary.

In *International Text Book Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. Rep. 481, 54 L. Ed. 678, the Text Book Company was a foreign corporation which, through agents maintaining their offices in the State of Kansas, had entered into contracts with students in said State by which sums of money as tuition were collected from the Kansas students and sent to the text book company in Pennsylvania, the latter then forwarding texts, questionnaires, pamphlets and papers to the students, which, however, were not sold, but only loaned during the course of instruction and returned eventually to the company. The Court held that the negotiation of the contract and the transportation of the books, pamphlets and correspondence between the parties all constituted transactions of commerce between the States and were not subject to burden of restriction by the State of Kansas.

In *Butler Bros. Shoe Co. v. U. S. Rubber Co.*, 156 Fed. 1, the Rubber Company, a New Jersey corporation, pursuant to a written agreement with the Shoe Company, a Colorado firm, supplied goods upon consignment. The Rubber Company later filed suit in the Colorado courts against the

local firm without having qualified as a foreign corporation, and its right to sue was challenged. The federal court, however, held the foreign corporation to be engaged in interstate commerce and entitled to sue. Judge Sanborn stated (156 Fed. at 17):

> "Importation into one State from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce.
>
> "The contracts before us constituted and caused commercial intercourse between citizens of different states. Their chief purpose and their principal effect were the importation of sound articles of commerce into the state of Colorado from other states and they necessarily constituted transactions in interstate commerce."

While we recognize that what constitutes commerce for purposes of regulation may not constitute commerce for purpose of taxation, we still submit that the reasoning in *National Labor Relations Board v. Jones and Laughlin Steel Corporation,* 301 U. S. 1, 81 L. Ed. 563, 57 Sup. Ct. Rep. 615, and companion cases, is logically sound and adds impetus to the fact that even in tax problems, activities analogous to those under consideration should be deemed interstate commerce.

We submit that the appellants' contracts are equivalent to those considered in the *Indiana Farmers' Guide, International Text Book Co.,* and *Butler Bros. Shoe Company* cases, supra, thus affording further and independent grounds for our main contention that the advertising under consideration, and contracts for the same, constitute interstate commerce.

IV.

THE ADVERTISEMENT OF GOODS DESTINED TO MOVE IN INTERSTATE COMMERCE, IN NEWSPAPERS THEMSELVES CIRCULATING BEYOND THE BOUNDARIES OF A STATE, CONSTITUTES INTERSTATE COMMERCE.

This point is irrevocably connected with our Points II and III, and all points could have been well combined under one heading. Perhaps the segregation we offer makes for clearer analysis. The cases discussed under Points II and III are singularly applicable here, and without rediscussing said cases, we resubmit them to the consideration of the court.

Aside from these authorities, we call attention to two persuasive analogies which indicate the inability of a state to tax the business of circulating intelligence, information and advertising, or the business of soliciting a demand for products which may later move in interstate commerce through other means than by advertising.

The first analogy is to the telegraph, telephone and radio cases.

The early case of *Paul v. Virginia* (1869), 19 L. ed. 357, held the issuance of a policy of insurance, although between citizens of different states, not to be a transaction of commerce. One of the grounds for the decision was that insurance contracts were not commodities which might be called "goods" as the court understood that term. The court was confronted with this decision a few years later in considering the power of a state to grant an exclusive franchise within the state for the transmission of telegraphic messages, and promptly enlarged its definition of commerce to keep up with the times. *Pensacola Telegraph Co. v. Western Union Telegraph Co.* (1877), 96 U. S. 1. See also *Western Union Telegraph Co. v. Pendleton* (1887) 122 U. S. 347.

And in *Telegraph Co. v. Texas* (1881) 105 U. S. 460, the

court invalidated a tax on messages directed to points outside the state. The principle has been expanded until there is no doubt at this date that a State cannot in any way directly interfere, by taxation or otherwise, with the business of the interstate transmission of telegraph and telephone messages. *Leloup v. Port of Mobile,* 127 U. S. 640; *Ratterman v. Western Union Telegraph Co.,* 127 U. S. 411; *Western Union Telegraph Co. v. Alabama,* 132 U. S. 472; *Western Union Telegraph Co. v. Kansas,* 216 U. S. 1; *Cooney v. Mountain States Tel. & Tel. Co.,* 294 U. S. 384.

The radio cases are even stronger. In *Station WBT, Inc. v. Poulnot,* 46 Fed. (2) 671, the court invalidated a South Carolina statute imposing a tax on radio receiving sets, holding them to be instrumentalities of interstate commerce. In 1933 the State of Washington passed a privilege tax very analogous to the New Mexico act under consideration, levying a one percent tax on the gross income from radio broadcasting. Washington Laws of 1933, Chapter 191, Section 2(2). This statute was challenged both in the lower federal and state courts. The lower federal court held the statute invalid. *KVL, Inc. v. Tax Commission of Washington,* 12 F. Supp. 497. The lower state court held likewise, but the State Supreme Court reversed this decision, holding the statute valid. *Fisher's Blend Station, Inc. v. Tax Commission of Washington,* 45 Pac. (2) 942; 49 Pac. (2) 1151. The latter case was taken to the United States Supreme Court, which on March 30, 1936, reversed the state court, and held the statute invalid, 297 U. S. 650, 56 S. Ct. 608, 80 L. ed. 956. We submit that this decision is one of the strongest authorities appellants can submit to sustain their position. Comparison of the New Mexico and Washington acts shows them to be identical in most respects. Hence, the case merits careful attention. In *Fisher's Blend Station, Inc. v. Tax Commission of Washington,* supra, appellants maintained two broadcasting stations, broadcasting over an area embracing several states, Alaska and Hawaii. Appellants' entire income was derived from advertisers who desired the broadcasts to reach the listening public in the areas which appellants covered, including nat-

urally many persons in other states. The tax was challenged as constituting a burden on interstate commerce. The Washington Supreme Court found the business to be entirely intra-state, and the tax on revenue too remote and incidental to affect appellants' interstate activities, if any. But the United States Supreme Court held otherwise, stating (80 L. ed. at 960):

> "The essential purpose and indispensable effect of all broadcasting is the transmission of intelligence from the broadcasting station to distant listeners. It is that for which the customer pays. By its very nature broadcasting transcends state lines and is national in its scope and importance—characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause. . . ."

The ready adaptation by the United States Supreme Court of its technical definition of interstate commerce as the transportation of commodities or goods, to the transmission of intelligence by telephone, telegraph and radio, gives a clear basis for the argument that the transmission of intelligence regarding the merits of commodities moving in interstate commerce itself constitutes commerce of that character. This is particularly true, in view of the fact that the holdings in these cases prohibit taxation by a state on the privilege of engaging in such businesses, because they were found to be interstate in their nature. We submit, however, that in said cases, the interstate commerce is of but a potential character; that is, state taxation is prohibited because messages of this character may and readily do cross state boundaries. The reasoning of these cases is more clearly applicable to the prohibition of state taxation on revenues derived from national advertising, since they are imposed on the fruits of the transmission of commercial intelligence across state boundaries, when that interstate transaction has become an accomplished fact, transcending the bounds of a mere interstate potentiality.

The second analogy to which we refer is the personal so-

licitation of trade, resulting in the transmission of goods across state boundaries. The law is well established that a state may not tax persons taking orders in one state for delivery of the products from another. *Robbins v. Shelby County Taxing District*, 120 U. S. 489; *McCall v. California*, 136 U. S. 104. We refer the Court to the language of these decisions, as being clearly applicable to the questions presented by present-day advertising, which has largely displaced the need for personal solicitation by representatives selling their goods in interstate commerce. National advertising of the type appearing in appellants' magazine is but the modern form of solicitation of prospective purchasers of the goods advertised. It is visual salesmanship, as contrasted with aural salesmanship by drummers; it is a sale by pictorial sample rather than by actual sample exhibited to the prospective purchaser. The doctrine of the *Robbins* and *McCall* cases finds direct application, especially since in newspaper advertising, the solicitation of sales, through presentation of the merits of a product which may later move across state boundaries, is made contemporaneously in several states. Under the doctrine of these cases, the State of New Mexico cannot constitutionally impose an excise tax on the privilege of selling goods in New Mexico and other states through visual presentation of them in advertisements contained in magazines or newspapers circulating in these states.

In concluding our argument on the main issue presented, we submit that the foregoing authorities conclusively establish that the advertising by advertisers and manufacturers residing outside of New Mexico, of goods destined to move into it and other states, in newspapers and magazines published in New Mexico, and circulated beyond its boundaries, constitutes interstate commerce, especially where the advertising contracts provide for the interstate transmission of the advertising materials and information. We further conclude that since the New Mexico School Emergency Tax Act of 1934 by its own terms excepts transactions in interstate commerce, that said Act can have no application and is illegal as applied to appellants' national advertising.

V.

THE NEW MEXICO SCHOOL EMERGENCY TAX ACT OF 1934, LEVYING A 2% TAX ON THE GROSS PROCEEDS OF APPELLANTS' NATIONAL ADVERTISING, IMPOSES A DIRECT BURDEN ON INTERSTATE COMMERCE AND IS UNCONSTITUTIONAL.

Appellees imply that in spite of the language of Chapter 7, New Mexico Special Session Laws of 1934, Section 202, excepting transactions in interstate commerce, that the tax is still valid since it affects only the revenue from advertising and constitutes only a remote and indirect burden, if at all, on interstate commerce. While we do admit the correctness of this implication, we answer the question to foreclose any doubt about the matter.

Where the taxing act is silent on the question, the rule is clearly established that for a state tax on interstate commerce to be invalid, it must constitute a direct, substantial and immediate burden thereon, as distinguished from an indirect, unsubstantial or incidental burden. 12 C. J. Par. 126, Page 96. A tax on gross receipts derived from interstate commerce is considered a direct burden, while a tax on net receipts is deemed an indirect and inconsequential burden.

The rule is well stated in *United States Glue Co. v. Town of Oak Creek,* 247 U. S. 321, 38 Sup. Ct. 499, 62 L. Ed. 1135 at 1141:

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Con-

> ceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce."

Our first inquiry, then, is whether the tax in dispute is one on gross receipts. This is undisputed. (Section 201, Chapter 7, Sp. Sess. L. of 1934.) "Gross receipts" is defined by Section 3 of the Act as total receipts of the taxpayer "without deduction on account of losses or expenses of any kind." Nothing in the act indicates the tax is on other than gross receipts. Accordingly, the act falls specifically within the principle of the *United States Glue Co.* case, and our inquiry on this phase is concluded.

Cases advanced by appellees indicate they rely on the theory that the tax is not on advertising directly, but on the privilege of publication, an intrastate function, with the measure of that privilege the proceeds from advertising; that accordingly, the burden is indirect and remote, and the tax legal. We submit this is exactly the theory of the Supreme Court of the State of Washington in *Fisher's Blend Station v. Tax Commission of Washington,* 45 Pac. (2) 942. However, the Supreme Court of the United States, in reversing the decision, promptly overruled that theory, saying (80 L. ed. at 960):

> "As appellant's income is derived from interstate commerce, the tax, measured by appellant's gross income, is of a type which has long been held to be an unconstitutional burden on interstate commerce. Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. Ed. 1200, 7 S. Ct. 1118, 1 Inters. Com. Rep. 308; Leloup v. Mobile, 127 U. S. 640, 32 L. Ed. 311, 8 S. Ct. 1380, 2 Inter. Com. Rep. 134; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. Ed. 1031, 28 S. Ct. 638; Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 62 L. Ed. 295, 38 S. Ct. 126. . . ."

Once the question of interstate commerce was determined, the United States Supreme Court was not long troubled

over the question of the directness of the burden imposed by the tax. We again emphasize the importance of this decision, because of the close similarity between the Washington and New Mexico taxing acts. Neither the state nor federal decisions quote the exact language of the Washington act, but reference to the original sources is enlightening. Compare Washington Laws of 1933, Chapter 191, Section 2(2),-(ed), and New Mexico Sp. Sess. Laws of 1934, Chapter 7, Section 201 (G), (H).

Again, further analysis of the act discloses the fallacy of appellees' theory. The New Mexico School Emergency Tax Act of 1934 attempts to embrace the entire sphere of business activities in the State of New Mexico (Sec. 201), with certain named exceptions (Sec. 212). The measure of the tax in all instances is gross receipts or gross proceeds. It is illegal to absorb the tax, but it must be passed on to the ultimate consumer (Sec. 204). As a practical matter, the tax is not on the privilege of engaging in business, but upon the sale or transaction itself. Applied to the instant case, the tax is not on the privilege of publishing a magazine, but directly on the *advertising*. The tax is not a privilege tax, but more nearly a general sales tax. See *State v. Welch*, 61 S. D. 593, 251 N. W. 189 at 196.

Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 38 S. Ct. 126, 62 L. Ed. 295, involved a Pennsylvania statute imposing on wholesale vendors of goods, a license tax, partly fixed by a standard price, and partly by gross volume of annual business. In determining defendant's tax, the amount received from sales outside the State were considered. The Court held the fixed fee valid, but held the other invalid, stating, (62 L. Ed. at 298):

> " . . . but the additional imposition of a percentage upon each dollar of the gross transactions in foreign commerce seems to us to be, by its necessary effect, a tax upon such commerce, and therefore a regulation of it.
>
> "The tax now under consideration . . . bears no sem-

> blance of a property tax, or a franchise tax in the proper sense; nor is it an occupation tax except as it is imposed upon the very carrying on of the business of exporting merchandise. *It operates to lay a direct burden upon every transaction in commerce by withholding, for the use of the state, a part of every dollar received in such transactions.*" (Italics supplied.)

In *Brown v. Maryland,* 12 Wheat. 419, 6 L. Ed. 678, in holding a tax on the occupation of an importer invalid under the commerce clause, the court states, (p. 444):

> "It is impossible to conceal from ourselves that this is varying the form without varying the substance .... All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself."

Cook v. Pennsylvania, 97 U. S. 566, 24 L. Ed. 1015, holds a tax on the amount of an auctioneer's sales a tax on the goods sold. *Panhandle Oil Co. v. Mississippi,* 277 U. S. 218, 72 L. Ed. 857, 48 S. Ct. 451, decides a privilege tax imposed on sellers of gasoline, fixed at so many cents per gallon sold, is a tax on sales. See also *Indian Motorcycle Co. v. United States,* 283, U. S. 570, 75 L. Ed. 1277, 51 S. Ct. 601.

In conclusion, it is submitted that the foregoing authorities establish that the tax under consideration, irrespective of the exception contained in the taxing act, would constitute a direct and immediate burden on interstate commerce.

VI.

APPELLEES' CASES DISTINGUISHED

Appellees, to sustain their contentions, have first cited and relied upon five decisions of the United States Supreme Court which should be carefully analyzed to determine whether they support the conclusions arrived at.

Paul v. Virginia (1869) 8 Wall. 168, 19 L. ed. 357, and *Hooper v. California* (1894) 155 U. S. 648, 39 L. ed. 297, held the making of insurance contracts not to be transactions in interstate commerce although between citizens of different states. These cases are clearly distinguishable. The fact that appellants' contracts are between citizens of different states is not the ultimate fact in our case, but rather just the beginning, and one of the many elements which considered together show a transaction in interstate commerce. In *Paul v. Virginia* and *Hooper v. California*, the court considered only the *making* of a contract which was to be performed only at some indefinite date in the future when a casualty might occur, and then within the state where the contract was made.

Williams v. Fears (1900), 179 U. S. 271, 46 L. ed. 186, sustained a tax on employment agents, although the laborers employed might go outside the state. The case does not show that Williams actually negotiated any contracts with laborers. The insurance decisions are relied on. *Ware and Leland v. Mobile County* (1908) 208 U. S. 405, 52 L. ed. 885, upholds a tax on the business of buying and selling cotton futures. The facts show that only in rare instances was actual delivery of cotton made, and then from warehouses in the cities where the purchase and sale made, or possibly by shipment from Alabama. The court, relying on the insurance decisions, emphasized the fact there was no contractual obligation on the seller of cotton to ship it from a point in Alabama to another state in performing the contract, nor was there necessarily any movement of commodities in interstate traffic. The facts of our case contrast sharply

with these. Compare *Di Santo v. Pennsylvania,* 273 U. S. 34, 71 L. Ed. 524, 47 S. Ct. 267; *Furst v. Brewster,* 282 U. S. 418, 75 L. Ed. 478, 51 S. Ct. 295; *Lembke v. Farmers Grain Co.,* 258 U. S. 50, 66 L. ed. 458, 42 S. Ct. 244.

Appellees' quotation from *Anderson v. U. S.* (1898), 171 U. S. 604, 43 L. Ed. 300, is inappropriate, since the court was not required to decide the question of interstate commerce, and the pronouncement is mere dictum. Even there, interstate commerce was involved only in so far as a refusal to do business was concerned.

Compare these five decisions with the facts of the instant case. None went beyond the mere making of a contract, and the movement of goods or persons was remote in the extreme. In our case, the advertising contract, between citizens of different states, is clearly induced by the extent of appellants' circulation and distribution into both New Mexico and in other states of the Union. (R. 2, 8). The contract requires the interstate movement of the advertising materials and other means of producing the advertisements. (R. 8). Immediately on publication, the magazines are directed into channels of interstate and intrastate commerce. The advertisements carried therein are an inextricable part of the national sales programs of national advertisers, and stimulate the demand for the goods advertised and cause interstate movements therein. Upon publication and circulation, payment by the advertiser is likewise made across state boundaries. (R. 8). This chain of events is widely different from the mere making of, or refusal to make, a contract of the nature considered in the five cases above reviewed. No national advertiser would utilize appellants' magazine if it were to be held in the press rooms, instead of being immediately directed into interstate circulation. The tax in issue is not upon the mere making of a contract—it is one upon the accomplished fact of publication and circulation within and without the state of New Mexico.

Appellees discuss the cases of *Little v. Smith,* and *State v. Salt Lake Tribune Publishing Co.,* supra, cases on which

we distinctly rely to support our contentions. (Pages 11, 12, supra). Appellees would glean therefrom a theory that merely taxing revenue makes the controlling distinction. We have already answered this theory. See pages 22 to 24 supra. Next appellees rely on *Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.*, also heretofore distinguished at pages 12 to 14 hereof.

Appellees' reliance on cases involving state franchise, license, privilege and income taxes prove nothing. These cases recognize and apply the rule heretofore stated (pages 21-22) that a tax on gross receipts is considered a burden on interstate commerce, and a tax on net receipts otherwise. However complex the facts in these cases, the formula remains the same. The excellent annotation at 105 A. L. R. 11-67 classifies most of the cases on which appellees rely, leaving undisturbed our contention that if the directness of the tax be an issue, the same is present. (Particularly, see 105 A.L.R. at 26, 27, 29, 34, 49, 52 and 63.)

In conclusion, we make this observation: Both parties have resorted to analogous situations found in decisions involving the Sherman Anti-Trust Act, state statutes prohibiting advertisement of cigarettes, insurances cases, federal regulatory measures, the right of foreign corporations to sue in state courts, state franchise, license, privilege and income taxes, etc. Appellants have submitted two further analogies—those of personal solicitations by non-residents, and the telegraph, telephone and radio cases. We again re-emphasize that in our opinion the closest analogy and the strongest precedent for our position is found in the United States Supreme Court's decision of *Fisher's Blend Station v. Tax Commission of Washington* (1936), supra, the single precedent offered by either side involving a state occupation tax measured by gross receipts from interstate business. As in the *Fisher's Blend* case, the New Mexico tax is not levied on the local activity—there the generation of electro-magnetic waves, here the running of a printing press and the publication of a magazine—but on the gross receipts for the service performed—there both the genera-

tion of the energy and the transmission of radio waves as a means of potential communication interstate, here the publication of a magazine and the transmission thereof as a means of undoubted communication interstate.

WHEREFORE, appellants pray that the judgment of the Supreme Court of the State of New Mexico be reversed.

Respectfully submitted,

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